Arkansas Case Shows Dilemma of Juries and Social Media

The Arkansas Supreme Court has reversed a murder conviction – and death sentence – in a case where one juror tweeted during trial and another fell asleep. Both of these problems, the court said, constituted juror misconduct requiring reversal and a n

ew trial. Erickson Dimas-Martinez v. State, 2011 Ark. 515 (Dec. 8, 2011).

While the court said the dozing juror alone required reversal of the conviction and sentence, the court added that the second juror's tweets also required a reversal.

The Supreme Court was particularly concerned about one of the juror's tweets, "Its (sic) over," sent 50 minutes before the jury informed the court that it had agreed on a sentence. As a result of this tweet, the court said, followers of the juror's Twitter feed – including, the court said, at least one journalist (with the online magazine *Ozarks Unbound*) – "had advance notice that the jury had completed its sentencing deliberations before an official announcement was made to the court."

Dimas-Martinez's lawyers also pointed out that the tweeting juror had sent his messages during the trial despite continued admonitions to the jury throughout the trial warning jurors not to do so, and that he continued tweeting after the trial judge specifically told him to stop after defense lawyers discovered an earlier tweet he had sent. (That one said, "Choices to be made. Hearts to be broken. We each define the great line.")

Courts nationwide have been struggling with the issue of jurors' use of social media during trials, which is a challenge to the legal system's notions that the evidence jurors use in deciding a case must conform to rules of evidence and other legal considerations; jurors should not discuss the case with each other until deliberations, and with non-jurors until after verdict.

These cases raise the question of whether admonishing jurors to not use the Internet and social media is effective.

In 2009 the Indiana Supreme Court denied a new trial in a civil case in which a juror had answered a cell phone call during deliberations. Henri v. Curto, 908 N.E.2d 196 (Ind. 2009). In that decision the court recommended that trial courts "discourage, restrict, prohibit or prevent access to mobile electronic communication devices by all persons except officers of the court during all trial proceedings, and particularly by jurors during jury deliberation." This led to changes in the state's jury rules banning juror use of all electronic communications devices, and to jury instructions admonishing jurors not to use these devices or social media to discuss or research the case. The jury instructions also explain "the reason for these restrictions is to ensure that your decision is based only on the evidence presented during trial and court's instructions on the law." Ind. Patt. Jury Instrs., Crim., Instr. 1.01.

Among other Midwestern states, Michigan, Minnesota, Missouri, Ohio, Oklahoma, Tennessee and Wisconsin all have amended their criminal and civil jury instructions in similar manner.

The Arkansas Supreme Court expressed its clear concern in the Dimas-Martinez case and suggested measures more drastic than admonitions may need to be taken:

[W]e take this opportunity to recognize the wide array of

possible juror misconduct that might result when jurors have unrestricted access to their mobile phones during a trial. Most mobile phones now allow instant access to a myriad of information. Not only can jurors access Facebook, Twitter or other social media sites, but they can also access news sites that might have information about a case. There is also the possibility that a juror could conduct research about many aspects of a case. Thus, we refer to the Supreme Court Committee on Criminal Practice and the Supreme Court Committee on Civil Practice for consideration of the question of whether jurors' access to mobile phones should be limited during a trial.

Of course, one problem with such bans is that they are not effective once the jury goes home for the day. Another is that they are often unevenly applied. For example, when the federal courthouse in New York City proposed a total ban on electronic devices, lawyers' groups sought an exemption from the rules. More recently, a new rule on electronic devices recently adopted by the local courts in the District of Columbia purports to ban all use of electronic devices in courtrooms, but then adds exemptions for people like pro-se litigants (with court permission); attorneys; probation officers; social workers in court on official business; and reporters (again, only with court permission).

While the jurors in the Dimas-Martinez murder trial were told not to tweet about the trial, it does not appear, based on the admonitions repeated in the Arkansas Supreme Court's decision, that they were told *why they should not do so*. This is despite the fact that the state's model jury instructions for criminal cases includes a lengthy discussion of the subject: After stating that "You must decide this case only on the evidence presented in the courtroom," the model instruction, Ark. Model Jury Instr., Civil 101 (Dec. 2010), states:

All of us are depending on you to follow these rules, so that there will be a fair and lawful resolution to this case. The

parties have entrusted their case to you and to no other person or entity. If you become aware of any violation of these rules you must notify court personnel of the violation.

Such full explanations of the possible consequences of jurors tweeting, texting and using other social media and the Internet during trial are probably going to be the only way the courts will be able to deal with this growing issue. Futile attempts to keep the electronic equipment out of the courthouse, or adopting unrealistic rules limiting their use, is not going to put the electronic genie back in the bottle.

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